No. 3580

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

MIKE KOSO,

Defendant in Error.

ABSTRACT OF CASES CITED IN BRIEF OF PLAINTIFF IN ERROR

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ABSTRACT OF CASES CITED IN BRIEF OF PLAINTIFF IN ERROR

The following abstracts are given of cases cited, except several cases commented upon in the printed brief, and a few additional cases at the end hereof showing requirement that evidence must indicate to a reasonable certainty that an injury is permanent. Some notations occur, and from some cases simply short quotations or statements of law are given. This abstract is submitted as a supplement to the brief, as an endeavor to aid the court and counsel the more readily to grasp the points and arguments of the plaintiff in error, and the law in support thereof.

Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382:

The court at page 388 states: "The last sentence of section 14 (Sec. 3176, R. S. A., 1913) reads:

'Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.' This seems to us a plain declaration by the legislature that the employee is at liberty to pursue any of the remedies provided by law until he adopts one by instituting a suit for redress, when the one adopted becomes exclusive."

Kerrigan v. Pennsylvania Railroad Co., (Pa.) 44 A. 1069:

The plaintiff was a brakeman and had an arm crushed. A volume containing Carlisle Tables was offered to show expectancy of life, was objected to and the objection overruled. The Appellate Court states that the offer was general and pointed to no particular life table applicable to the special facts of the case; it did not suggest whose lives, what class, or what the perils of the employment were; the objection was general and the lower court inadvertently admitted the tables and fell into error because it had no aid from either side. Carlisle Tables have been admitted in cases to determine expectancy of life because they are based on general population and not on selected risks, and their value depends greatly upon similarity of the life in question to conditions and habits one hundred years ago. The Court states that C. J. Paxson in the Steinbrunner case expressed the fear these tables would prove dangerous unless the attention of juries was pointedly called to other matters affecting the expectancy.

In this case the habits and health were not proven and under the meager facts, expectancy as fixed

by the tables can have but little weight. No doubt tables made up by reputable insurance companies furnish a fair expectancy on selected lives on which they are based. There was scarcely any proof of facts which brought the plaintiff within the class of selected lives. The court below stated life expectancy was estimated at approximately forty years and the jury could take that as a means of estimation; the fair inference was that the tables established this. Such tables are not entitled to that weight unless by proving the plaintiff had brought himself within the selected lives.

The court called attention to the care that ought to be exercised in dealing with this kind of evidence in any particular case and states that experience has demonstrated Justice Paxson's fear. Courts and juries are apt to supply the place of proof of the particular life by generalization from life tables. This is going further than is intended or warranted. The case was reversed.

Rooney v. N. Y. N. H. & H. R., 53 N. E. 435:

These tables (annuity) are usually computed on the probabilities for sound lives, while in cases on trial many circumstances make different probabilities. In estimating damages for personal injury the amount to be allowed for loss of ability to earn depends on conditions which vary. The physical condition of plaintiff would very likely have changed from other causes if there had been no accident; income from any calling is not constant; ability to get employment is likely to change. For these and other reasons, annuity tables will seldom

be found helpful; and if used, the jury should be carefully instructed to apply them only so far as the facts found correspond to those on which the tables are computed.

Steinbrunner v. Pittsburg Railway Co. (Pa.), 28 Am. St. Rep. 806, at page 810:

The value of mortality tables will depend very much on health, habits, social surroundings, and other circumstances and attention of juires should be pointedly called to those qualifying circumstances.

Ward v. Dampskibsselskabet, 144 Fed. 524. At page 526, it is stated:

But the restriction under which such testimony should be received and the cautions with which it should be submitted to the jury are clearly and authoritatively set forth in Kerrigan v. Pa. R. R.

City of Friend v. Ingersoll (Neb.), 58 N. W. 281:

Sidewalk fall; hip broken, cancer, etc. Carlisle tables offered. This table admitted in cases of death or where injury is shown to be permanent. The admissibility of the table should, it seems to us, depend—to some if not to a great extent—upon what facts enter into it. If based upon selected or healthy lives alone it cannot be introduced in any case except where the same kind of life is involved. If based on general average of lives, it is competent in any proper case in which expectancy is an element, not as conclusive. Age and habits are among important matters for consideration.

It appears Carlisle tables are based on general population, and not on selected or insurable lives.

Kahn v. Herold, 147 Fed. 575.

At page 582, the Court states: "Life tables at the best are uncertain and conjectural evidence. They are used because in many cases they afford the best, if not the only means of ascertaining the probable duration of life." It is unnecessary to decide the question whether their use is unwarranted.

Grier v. Louisville R. R. Co. (Ky.), 42 Am. St. Rep. 345:

In this case evidence from Mortality Tables showing the expectancy was read. The court quotes an authority to the effect that such evidence is competent where the injuries are permanent, but the court states that such evidence must be taken subject to conditions surrounding the particular individual and in connection with the fact that the mere probable continuance of life is shown and not the duration of ability to work. At page 350, the Court states:

> "On the whole it would seem better if the jury are to find for the plaintiff in a given case that they should be instructed in estimating the amount of the damages to take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering, and mental anguish resulting from the injury received, and the loss sustained by the want of the limb injured and the extent to which he

is disabled from making a support for himself by reason of the injury received."

Corpus Juris, Vol. 17, pg. 875, Note 84a:

The jury must be instructed that the value of Mortality Tables when applied to a particular case will depend upon other matters such as the state of health, habits and social surroundings.

Pauza v. Lehigh Valley Coal Co. (Pa.), 80 A. 1126:

It is the duty of the judge to carefully guard the effect to be given (table) by the jury. Unless this is done in a very pointed and direct way by the court, the jury may be misled as to value and weight to be attached to this character of evidence. The important fact for the jury to determine is the life expectancy of the injured party. This depends more on his prior state of health, character, habits, perils of employment, personal characteristics and other circumstances surrounding his own life than it does upon the average expectancy of other lives. The trial judge should instruct that these tables are not to be accepted as establishing the expectancy but only as an aid. It is not sufficient to instruct the jury that the tables are some aid, but not conclusive in determining the life expectancy of the injured party. All the circumstances affecting the probable duration of life disclosed by the evidence should be called to the attention of the jury in order that they may have an intelligent understanding of what their duty is in determining the life expectancy in the particular case.

MacGregor v. R. I. Co., 60 At. 761:

The plaintiff suffered by jolt and shock and alleged "For a long time to come he would continue to suffer pain and nervous shock, and will be unable to earn any wages." The court states that in some injuries the permanency is obvious while in others it is a mere probability, and a careful consideration of the medical testimony shows no evidence of permanency "since no one of them testified that their permanency is even probable" but simply that the injuries may last indefinitely.

To entitle plaintiff to recover present damages for apprehended future consequences, there must be such degree of probability of their occurring as amounts to a reasonable certainty they will result from the original injury.

Such being the state of the evidence the court said it failed to see the relevancy of mortality tables; that such tables may be proper where there is death, or permanent injury is inevitable, or with reasonable probability must result, but where such injury is not shown to be probable, not to say that it is not proven, the admission is improper.

While it is not possible to determine accurately upon what testimony the jury based its verdict, if the amount is based on permanent injury for a period established by life tables, the evidence does not warrant such finding. The case was reversed.

Filer v. N. Y. C. R. R., 49 N. Y. 43:

Compensation for past and prospective damages. Limit respecting future damages is that they must

be such as it is reasonably certain will inevitably and necessarily result from the injury. At page 46 the Court says:

> "There is no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has been, or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future." Hypothetical question to expert held competent.

Tweedy v. Inland Brewing Company, 134 Pac. 468:

There was a collision between a bicycle and a truck, and a verdict for $4000.00, from which appeal was made on the ground that it was excessive. The court stated at page 469:

> "Having read the testimony and being fully conscious of the weight to be given the verdict, we believe this contention must be sustained.
>
> "The injuries to the plaintiff as testified to by a physician who attended him was 'excessive soreness throughout the cervical region' extending down between the shoulders to the third and fourth dorsal vertebra. The accident was in June and the trial was in November; the plaintiff testified he was unable to follow his trade of carpenter (admitted having worked four and one-half days and at other times). Another physician testified to a condition 'we do not understand', that is a liquid deposit in and around the spinal column and a superabundance of lub-

> ricating fluid on his spinal cord, with more or less what we call solid matter, and it remains, does not absorb . . . . . the present condition of respondent will become permanent."

Another physician testified that continued treatment would overcome the condition. The court states it appears to us from the evidence before us the jury was not justified in assessing damages on any theory of permanent injury, and that the verdict should have been for such a sum as would compensate the plaintiff for the pain and suffering endured and for an injury of a temporary nature. Such a sum should not exceed $1500.

(If the court in the above case after testimony of a physician giving the specific opinion of permanency of an injury to the spine, could decide there was nothing to justify the theory of permanent injury, and accordingly modify the verdict, what possible support is there for a theory of the permanency of the injury in the present case).

Mott v. Det. G. H. & M. R. Co., 79 N. W. 3:

Plaintiff bruised, shoulder was partly dislocated. Verdict for $2000, reversed. Plaintiff was allowed to introduce the mortality tables which showed plaintiff's expectancy of life was forty years. These tables are only admissible in a case of permanent injury, or where suit is brought by representatives of the deceased. Plaintiff offered no testimony to show permanent injury. All the physicians found no evidence of any, and he himself on trial said he

was not as bad as he used to be. The court said this testimony should have been excluded.

W. U. Tel. Co. v. Morris, 83 Fed. 992, (C. C. A. 8th Circuit):

At page 995 the Court says: "In some cases injuries are sustained which are of such a nature as will, in themselves, warrant an inference that they will permanently affect the injured person's health or lessen his capacity to labor; but in the present case we cannot say that the injuries inflicted by surgical operation were of such a character that the jury were at liberty to infer therefrom that the health of plaintiff would be permanently affected or his capacity to labor thereby impaired." Reversal of judgment.

(Note: Operation referred to was removal of ovaries, etc. It is a well established rule in cases of this character that where damages are claimed for a permanent impairment of health there must be some evidence before the jury tending to show such damage, otherwise an instruction "to consider the probability of a permanent impairment" is erroneous and sufficient cause for reversal).

Sax. v. Det. G. H. & M. Co., 84 N. W. 314:

Brakeman's hand injured; idle four months; reemployed and discharged. Sued for breach. Mortality tables admitted to show expectancy. In Texas it is held that the disability must be not only permanent, but total to admit. Tables admissible wherever expectancy of life comes in controversy. In this case there were other elements to be con-

sidered. His probable infirmity was also an important factor. The tables should have been excluded.

Leach v. Detroit Co., 84 N. W. 316:

Mortality tables were introduced and claimed to have been erroneously admitted because it was not shown the injuries were permanent. Plaintiff contends the testimony shows they were permanent and relies on testimony of Dr. K, but we think under any fair interpretation of his testimony it falls short of showing permanent character, while the testimony of Dr. D shows a trifling injury. Court cites the Mott and Sax cases holding mortality tables were inadmissible. Judgment was reversed.

Tenney v. Rapid City, 96 N. W. 96:

Sidewalk injury; judgment reversed; plaintiff offered N. W. Life Tables. Defendant objected as irrelevant, immaterial, and no proof of permanency. Overruled. The admission of these tables was clearly erroneous and constituted prejudicial error. No evidence is disclosed that plaintiff was permanently injured or might not recover from injuries. The court said the admission therefore constituted reversible error.

Foster v. Village of Bellaire, 86 N. W. 383:

The testimony offered on the part of the plaintiff tended to show that she was seriously injured, but it did not show she might not recover.

Against objection, tables were admitted. For

this error judgment reversed. (7 Encyc. of Evidence 426 also supports this).

Hardy v. Milwaukee, St. L. Ry. Co., 89 Wis. 183, 61 N. W. 771:

The rule is that the alleged permanent disability in order to be a ground for damages must be one that is reasonably certain to result from the injury complained of.

The charge of the lower court allowed the jury to assess damages for pain etc., which plaintiff "may endure hereafter." The higher court states that the rule is that the alleged permanent disability, in order to be ground for damages, must be one that is reasonably certain to result from the injury complained of. We think that the charge was too broad and allowed the jury to go into a field of mere probability instead of being confined to the field of reasonable certainty. The judgment was reversed.

St. L. & S. F. R. v. Nelson, 49 S. W. 710:

Loss of arm in railway accident. Where the injury has not resulted in death or total disability, such evidence (tables) should not be admitted, as it would tend only to confuse the jury upon the measure of damage.

Tex. Mex. Ry. Co. v. Douglas, 7 S. W. 77:

Permanent injury to hand. Judgment reversed. The rule seems to be that when death results from an injury, or when the evidence tends to show that

the earning capacity of the party is entirely destroyed, the testimony is admissible (Iowa cases). We think where the disability is shown to be only partial, such evidence would tend to confuse the jury.

City of Honey Grove v. Lamaster, 50 S. W. 1053:

Hand injured by electric wire; court says rule in Douglas case applies, that life expectancy is not legitimate evidence where impairment is not shown to be permanent. Reversed.

Remsnider v. Union Savings & Trust Co., 154 Pac. 135:

A janitor was crushed by an elevator and was awarded $5000.00 damages. The only contested fact was the character and extent of his injuries. On appeal the contention was there was an excessive verdict. The evidence showed the injury was mainly to the sciatic nerve, resulting in partial paralysis of the right leg and foot, also hernia and injury to the kidneys, causing blood passage. All of these conditions persisted at the time of the trial, nine months after the injury; five doctors testified; two said he was malingering and the injury was not permanent; three were of the opinion the suffering was real, and two of these latter were positive that there was permanent injury, while one was doubtful whether there would be complete restoration. Upon this conflict of testimony, the question of permanency was said by the court to be for the jury.

(This case shows the kind and positiveness of

conflicting testimony which is required before a conflict of evidence as to permanency is warranted for submission to the jury).

City of Shawnee v. Slankard, 116 Pac. 803:

Evidence showed serious character of injuries; physician testified they were such as would indicate a permanent weakness, and the injured shoulder would not be likely to ever recover strength. Tables are evidence where proof shows earning capacity is destroyed and the injury will probably be permanent, as shown in the case. Because of these things, the lower court did not err in permitting introduction of tables.

Thayer v. Denver & R. G. R. Co. 154 Pac. 691:

An engine and car collided and the plaintiff was thrown from the top of the car; his leg was broken, his face cut and bruised, his teeth knocked loose, his jaw affected, and his hearing injured. He testified at the trial that he still suffered pain at the point of break, that his hearing was gradually growing worse, and that he was not able to chew on the side of his jaw that was injured.

The lower court, over objection, permitted the American Mortality Tables to be admitted. The appellant claimed error in admission on the ground "that there was no proof that appellant's injuries were permanent." At page 702, the Court states:

> "As to whether the evidence established the fact that the injuries were permanent need not be considered, as such fact may be established upon the subsequent trial, if it

> was not so established in the former trial * * * The rule only need be stated, that in order to justify the admission of evidence of life expectancy, the evidence must establish the fact that the injury was permanent. And it is not sufficient that the evidence shows that the injury was serious. But the mere fact that the evidence as to the permanency of such disability is conflicting will not necessitate the exclusion of the evidence."
>
> "If there is substantial evidence tending to show that the injuries are permanent, such tables are properly received in evidence."

This case was reversed.

(It will be noted that the injuries in the above case were, according to the evidence, more serious than in the case in question, yet the court throws doubt upon the extent and states that the evidence must establish permanent injury).

Snyder v. Great Northern Ry. Co., (Wash.), 152 Pac. 703:

An engineer jumped from the locomotive when it was derailed, and was seriously injured. At page 706 (4) the Court states:

> "In the course of the trial the court permitted the introduction of mortality tables to show the expectancy of life of the plaintiff. It is argued by the defendant that this was error, because it was not shown that the plaintiff was permanently injured. We think this position must be sustained. The most the evidence showed was that the plaintiff developed a neurasthenic condition after his

injuries. He testified that since his injuries he has been required to walk with a cane, and with a limp or dragging of the foot. But we think there was no evidence of the fact that this dragging of the foot or limping was the result of the injuries which he received at the time of the accident. None of the doctors testified, so far as the record shows, that the natural and reasonably probable result of the injuries which the plaintiff received at the time of the accident would be a permanent injury. The court therefore erred in receiving these mortality tables in evidence."

There was a verdict for $9500.00, which was remitted $3000.00 under the order of the lower court but the defendant appealed from the reduced judgment and the judgment was reversed by the Supreme Court.

Pollock v. Pollock, 71 N. Y. 140:

This case holds that it is an error of law to find a material fact when there was a total absence of evidence to sustain it; that when it is said there is no evidence to go to a jury, it is not meant there is literally none but that there is none which ought to reasonably satisfy a jury; that insufficient evidence is, in the eye of the law, no evidence.

The Warren Adams, 74 Fed. 413:

When goods are damaged while in the possesion of a carrier, there is prima facie presumption that the injury is occasioned by the carriers default, and the burden is upon him to prove that the dam-

age arose from a cause for which he is not responsible.

Hudson River L. Co. v. Wheeler Co., 93 Fed. 374:

The fact that an article was shipped in good order and was found damaged on delivery is presumptive evidence of negligence on the part of the carrier, and casts upon it the burden of proof in what manner the breakage occurred.

C. & A. Co. v. Chambers, 20 Ariz. 54:

The plaintiff, in order to recover under the Employer's Liability Law is required to allege in his complaint and sustain by evidence that he was employed by the defendant in an occupation declared hazardous and while engaged in the performance of the duties required of him was injured and the injury was caused by an accident due to a condition or conditions of such employment, and was not caused by the negligence of the plaintiff.

St. Louis Cordage Co. v. Miller, 126 Fed. 495; (C. C. A. 8th Circuit):

At page 508 the Court states: "A preliminary question for the judge always arises at the close of the evidence, and before a case can be submitted to the jury. That question is not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict" (Supported by many Federal authorities).

Vicksburg & Meridian R. R. Co. v. Putnam, 30 L. Ed. 257; 118 U. S. 545:

Limiting the jury to mortality tables and nowhere suggesting that they are at liberty to arrive at a result independently thereof, is erroneous.

Where the court judges as to the use of annuity tables it is its duty to fully instruct the jury concerning the use of and weight which should be given, and it should in a case where the evidence, whether the injury is permanent or temporary, is conflicting, instruct them that before making use of the tables they must find that the injury is permanent. C. J. Volume 17, pg. 1081.

Florida Central & T. R. R. v. Brunner, 26 SE 730:

In this case the Georgia Supreme Court holds the instruction on mortality tables as incorrect and misleading, states there has been much confusion in many instances, and formulates for the guidance of courts, a series of instructions which should be given on the differing conditions in those cases in which mortality tables may be admissible as evidence. These instructions are lengthy and denote the care and detail which is essential in giving instructions based upon such tables.

Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 37 L. Ed. 284:

In an action for personal injuries the plaintiff may recover for future damages when the evidence justifies a finding that such damages are the inevitable and necessary result.

Strohm v. N. Y. Lake Erie & W. R. R., 96 N. Y. 304:

A new trial was ordered on account of admission of evidence of a doctor as to disorders into which symptoms might deevlop. Future consequences, reasonably to be expected to follow, may be given in evidence, but they must be such as in ordinary course are reasonably certain to ensue. Consequences that are contingent, speculative or merely possible are not proper. It is not enough that injuries may develop into more serious conditions, or likely to develop. There must be a degree of probability that amounts to reasonable certainty.

Main v. Grand Rapids G. H. & M. R. R., 174 N. W. 157:

Plaintiff had scar and nervous headaches. Alleged permanent disfigurement and future great bodily pain. Defendant claimed court in charge, in effect, authorized the jury to award damages for claimed headaches as permanent injuries, as to which there was no proof, and to conjecture as to recurrences concerning which there was no proof amounting to reasonable certainty. The trial court in charge said "if you find nervous system impaired * * * you will consider how long such condition may continue as far as the evidence shows."

The higher court stated: "The instruction should be confined to such damages as are proximately shown by the evidence, with reasonable certainty, to result. Only such future damages are recover-

able as evidence makes reasonably certain will necessarily result from the injury."

Ayres v. Del. L. & W. R. R., 158 N. Y. 254:

A girl's knee and spine were injured, which required cast, braces, etc. She still wore brace at the time of trial and the evidence showed she limped. The doctor testified he could, with reasonable certainty, state his opinion as to the length of time the condition of the spine would continue, and said probably more or less as long as she lived.

The defendant asked the court to charge there was no ground to find future damages to knee. The Court said: "There was no request to charge that the jury could not find any permanent damages * * * but simply any future damages. While future inconvenience might be slight and of short duration, defendant is not entitled to have it altogether withdrawn from consideration."

(This indicated that the court considered permanent injuries could not be found, and there is a distinction between future and permanent damages as such).

Daigneau v. Grank Trunk R. R. Co., (Mass.), 153 Fed. 593:

Plaintiff wrenched and bruised his back. The Court stated that the plaintiff is entitled to recover for such future consequences of the injury inflicted as the proofs showed are reasonably certain to result. The plaintiff has the burden of proof. Evidence which leaves the matter entirely

in doubt or establishes a mere possibility of future damages does not satisfy the rule which requires proof that future consequences are reasonably certain to ensue. The preponderance of evidence showed plaintiff would recover in great degree. A new trial was ordered unless $2000 of $6500 was remitted.

U. S. Cast Iron Pipe & Foundry Co. v. Eastham, 237 Fed. 185:

A complaint alleged the injuries permanently rendered the plaintiff less able to work; the evidence of plaintiff's doctor was that it would be twelve months before plaintiff would recover the use of his arm and there was no other evidence tending to show to what extent the disability would decrease the earning power. The Court said that charge that jury should, if they found for plaintiff assess damages sufficient to compensate for all damage plaintiff was found to have suffered was reversible error unless the attention of jury was called to fact it could not assess for decreased earning capacity shown by the physician's testimony, as such damages are nominal where evidence does not furnish a basis for substantial damages for decreased earning capacity.

At page 188: "The jury is not allowed to invade the realm of supposition to arrive at the compensation to be awarded the plaintiff for this element of damages."

New trial was ordered.

Seigfried v. Pa. R. R., 55 A. 1061:

Having admitted Carlisle Tables to show ex-

pectancy of life, the judge should have more carefully guarded the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question.

The value of mortality tables will depend very much on health, habits, social surroundings, and other circumstances and attention of juries should be pointedly called to those qualifying circumstances. (Steinbrunner v. Pitts. Ry. Co.)

It is not sufficient to say, as the court did, that the tables were of some aid, but not conclusive. All the circumstances affecting the probable duration of plaintiff's life as disclosed by the evidence, or concerning which there was testimony, should have been called to the attention of the jury. Unless this is done, and in a very pointed and direct way by the court, mortality tables are very likely to have more weight with the jury than should be given. Judgment reversed.

Mason v. Lord, 40 N. Y. 476:

Note: This case, as well as the following one, holds that it is error for a court to find a fact unsupported by evidence, or to refuse to find a fact proved by uncontradicted evidence.

Putnam v. Hubbell, 42 N. Y. 106:

A referee has no right to find a fact * * * in the absence of any proof tending to establish it, any more than a judge upon trial has, under like circumstances, the right to submit such a question to a jury. If the judge should so submit it to the

jury he commits a legal error, which upon proper exception taken, may be reviewed by this court.

The Grecian Monarch, 32 Fed. 635:

A seaman was injured in a fall, was unconscious two or three days and in the hospital three months; he complained of pain in his back continuing to the time of trial, four years, preventing any continuous work. The court said there was no evidence of chronic debility in support of permanent disability and reduced the damages from $3638 to $1200.

The Iroquois, 113 Fed. 96:

A seaman had his leg broken and was ten weeks without medical attention; his leg was amputated; he was twenty years old and in good health and strength. The court stated that he could do light work, and based upon this and upon his pain and suffering and the fact the injury would be permanent he was entitled to $3000.

Sheyer v. Lowell (Cal.) 66 Pac. 307:

Plaintiff's knee was injured and he was under care of physicians for two months; at the time of trial nearly a year later he had not recovered. $300 was given.

Leeson v. Sawmill Phoenix, (Wash.) 83 Pac. 891:

Plaintiff was working at a lathe and was struck and ruptured. Verdict was ordered reduced or a new trial granted. Evidence showed that since quitting mill plaintiff had engaged a small part of

the time in some occupations not requiring much physical exertion. At page 895, the Court: "We believe the sum of $3500 would be fair and ample compensation and much more in accord with what is right in the premises. An excessive verdict in a case like this is not only an injustice to the defendants, but it is a menace to the welfare of the state and should not be upheld."

Klein v. Phelps Lumber Co., 135 Pac. 226:

Negligent blasting; plaintiff knocked senseless; injury to head, foot, and was nervous and weak. Recovery was difficult. Plaintiff was about fifty-two years of age. There was a depression on his skull and physicians testified "he may never recover." We are unable to say under those circumstances that a verdict for $2000 is excessive.

Missouri Pac. Ry. Co. v. Tex. Pacific Ry. Co., 41 Fed. 311:

A woman who was keeping a board car had her leg broken, arm dislocated and back, shoulder and side injured in a collision. At time of trial, after two years, plaintiff who had been a strong healthy woman, was "hardly able to dress herself." The state court awarded $10,000 but the federal court reduced this amount to $5000 on the ground it was excessive, and $5000 was ample.

Hamburg American Co. v. Baker, 185 Fed. 60:

Plaintiff was forty-eight years old and foreman, strong and vigorous; due to negligence of defendant he was "entirely disabled for life"; vertebrae

in his back were broken; he had suffered much and would continue to suffer and testimony showed his debility was of a progressive character. $4500 was allowed because of the character of the injury and the permanent disability.

The Anchoria, 113 Fed. 982:

Injury was conceded to be very serious; plaintiff was unconscious several days; compound fracture of the leg necessitated several operations and intense agony; leg was shortened three inches and stiff; in consequence plaintiff became permanently disabled. $6000 was held reasonable.

Louisville & N. R. Co. v. Subant, 96 Ky. 197: 27 S. W. 999 (Century Digest Vol. 15, Column 2114):

In an action for personal injuries where the evidence fails to show any permanent injury whatever, a verdict for $6000 is excessive.

Wood v. Louisville and N. R. Co., 88 Fed. 44:

A verdict for $8000, for the loss of one foot and toes on the other foot by a brakeman, ordered to be cut in half. The court expresses its reluctance to interfere with verdicts but states that the courts must see that justice is done.

Engler v. W. U. Tel. Co., 69 Fed. 185:

At page 187: "The argument that juries . . . are disposed to give heavy damages in actions for personal injuries against corporations is undoubtedly true. But the records of this court will show

that it has never hesitated where the amount was deemed excessive to set such verdicts aside."

The following additional cases are cited in support of Specifications of Error IV (2) and IX, pages 29 ad 40 of Brief of Plaintiff in Error:

White v. Milwaukee St. Ry. Co., (Wis.) 21 N. W. 524:

The jury in the lower court found that "plaintiff sustained temporary injury to leg, which may prove permanent." Plaintiff had introduced testimony that she had not recovered from the injury and it might be permanent. The Supreme Court states: "A mere possible continuance of disability by reason of an injury is not a proper element of damages to justify a jury in assessing damages for future or permanent disability, it must appear by the proofs that continued or permanent disability are reasonably certain to result." "It is fair to assume that the jury predicated their assessment of damages in part upon the possibility of permanent injury. This is error." Judgment reversed.

McBride v. St. Paul (Minn.) 75 N. W. 231:

The lower court charged "you have a right to take into consideration * * * also, if there is any evidence to sustain it, the probability or improbability of this accident resulting in any permanent injury to plaintiff's health." The higher court said: "In our opinion this part of the charge is erroneous. The plaintiff is not entitled to re-

cover for permanent injury unless there is reasonable certainty that the injury will be permanent."

Meeter v. Manhattan Co., 75 N. Y. S. 561:

Plaintiff's physician was asked "Can you say with reasonable certainty whether this injury is likely to be permanent?" He replied "It is likely to be permanent in the sense that it will improve somewhat but she is not likely to ever get entirely over it." He testified further that the disease tended to shorten life in many cases. The lower court charged "If you consider she is permanently injured you may award compensation for that. When I say 'if you consider' I mean if you consider from the evidence."

The higher court states "In view of what preceded it is evident that sufficient weight was not given to the true rule that should be applied in regard to giving damages for permanent personal injury in cases of this kind." In the reception of evidence and in the efforts made to exclude what was regarded by the defendants as incompetent and in the charge of the court, the effect was to some extent to permit the jury to understand that they were at liberty to award damages for injuries which were likely to be permanent, instead of confining their verdict to damages for such injuries as would with reasonable certainty be permanent."

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